

83-570

Office-Supreme Court, U.S.

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OCT 3 1983

ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

October Term, 1983

REVEREND W. EUGENE SCOTT, PH.D.,

Petitioner,

vs.

JOEL ROSENBERG, WILLIAM B. RAY, JEFFREY MALICKSON,
WALLACE JOHNSON, and ARTHUR L. GINSBERG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Reverend W. Eugene Scott, Ph.D.

Questions Presented.*

1. Whether, where the Ninth Circuit held that the compelling governmental interest in preventing diversion of funds raised for church projects outweighed the interference with Petitioner's free exercise rights resulting from the compelled disclosure by employees of the Federal Communications Commission from a church-licensee of the records of the pledges and donations of Petitioner, the judgment of that court was obtained by fraud committed upon it by the Respondents, where the factual predicate for the court's finding of the existence of a compelling governmental interest, that there were "allegations of fraud" and "fraudulent practices alleged" against the Petitioner and that the Respondents had conducted "several interviews in which they received information to support the allegations", was in fact non-existent and fraudulently proffered by the Respondents.
2. Whether the above actions of the Respondents violated due process.
3. Whether the above actions of the Respondents violated Petitioner's rights guaranteed under the Religion Clauses.
4. Whether the Ninth Circuit erred in denying Petitioner's motion to vacate judgment without a hearing.

*Petitioner brings this action as an individual. All parties in this action are named in the caption.

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Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

Petitioner, Reverend W. Eugene Scott, Ph.D., respectfully prays that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit entered on April 13, 1983, denying Petitioner's motion to vacate the judgment of said court entered on January 21, 1983 affirming the Summary Judgment of the United States District Court for the Central District of California.

Opinion Below.

The order of the Court of Appeals is unreported and is reproduced in Appendix (App.) A, p. 1. The opinion of the court delivered in connection with the underlying judgment is reported as 702 F.2d 1263 (1983) and is reproduced in App. B, pp. 2-23.

Jurisdiction.

The order of the Court of Appeals was entered on April 13, 1983. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied June 20, 1983. App. C, p. 24. On September 16, 1983, Associate Justice William H. Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 3, 1983. (App. D, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Provisions Involved.

United States Constitution, Amendments I and V, and Title 28 United States Code, Federal Rules of Civil Procedure, Rule 60, which are printed in full in Appendix E, pp. 26-27.

Statement of the Case.

Petitioner is the duly-elected pastor of Faith Center, a 36-year-old church of congregational polity with its main sanctuary in Glendale, California. Petitioner is world-renowned for his tireless efforts to preserve unfeigned respect for both his God and his country, not only through his penetrating, challenging, and authoritative preaching of Scripture, but also by securing the separation of church and state, and thus, the dignity of both.

Toward these ends, Faith Center, fountainhead of Petitioner's television ministry and *the* pioneer in Christian television programming, owns the broadcasting licenses for KHOF-TV, Channel 30, San Bernardino, California, KVOF-TV, Channel 38, San Francisco, California, KHOF-FM, 99.5 FM, Los Angeles, California, and WHCT-TV, Channel 18, Hartford, Connecticut. Petitioner also broadcasts over an ever-expanding satellite network, from Seattle to Miami and from Washington, D.C. to Los Angeles.

But it was not always so. The Faith Center of today stands in marked contrast to the Faith Center of 1975 whose only salvation appeared to lie in declaring bankruptcy. \$4,000,000 dollars in debt with \$19,000 cash, Faith Center, by the unanimous vote of its congregation and its board of directors, turned to Petitioner, whose role as financial consultant to churches across the globe rendered him uniquely qualified for the Herculean task of reconstruction that lay ahead. Selfless managerial effort plus the rallying of the supporting audience through the unparalleled preaching of God's Word resulted in the revitalizing of a viable ministry outreach.

Ironically, as will hereafter be shown, it was the very uncompromising nature of Petitioner in preserving the separation of church and state, and in particular, preventing unwarranted encroachment of the government into church financial affairs,¹ that was to expose Petitioner and the church he pastored to the retaliatory misdeeds of ex-employees fired for the self-dealing and mismanagement which were the causes of Faith Center's near financial ruin. For alleged complaints, subsequently proven to be non-existent, from two of these ex-employees, who were very familiar with Petitioner's resistance to unjustified government invasions of church affairs, were to be the purported grounds for Respondents' desires to forage through church records.

In September of 1977, acting allegedly on a complaint received from one Paul Diederich, a former cameraman for

¹Petitioner successfully defended Faith Center in attempts by Los Angeles County to tax constitutionally tax-exempt properties of the church, won NLRB reversal of lower administrative rulings that church employees could be unionized, and secured the recognition of the California legislature through the enactment of the Petris Bill that the Attorney-General, then participating in the very investigation subsequently assumed by the FCC and the subject of the instant litigation, had no business inquiring into the administration of church funds absent criminal probable cause, thus terminating the Attorney-General's investigation.

the church who was terminated for falsifying time cards, Respondents, all of whom are present or former employees and officers of the Federal Communications Commission (hereafter, FCC), commenced an investigation of Faith Center. Respondents demanded access to all the church's financial records. The church responded in part to the demands of Respondents, but neither the board nor the congregation could in good conscience comply with the demand for those records which would reveal the identity of its donors, including that of Petitioner, in connection with the amounts given to the church and its pastor. The basis for this refusal was grounded and clearly stated in the Christian beliefs of Petitioner and the denomination to which the church belongs. Members of that denomination, the Full Gospel Fellowship of Churches and Ministers, International headquartered in Dallas, Texas and composed of over 2,000 member churches and 2 million adherents, are strictly commanded to give in secret. This is based upon Matthew 6:1-4 which states:

“Take heed that ye do not your alms before men, to be seen of men: otherwise ye have no reward of your Father which is in heaven. Therefore, when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret: and thy Father which seeth in secret himself shall reward thee openly.”

Any coerced disclosure of donations therefore directly violates a central tenet of Petitioner's religious beliefs. Respondents were advised that their demands infringed upon Petitioner's religious freedom, yet continued their demands. In August of 1978, Petitioner, finding no other recourse to

protect himself against the intrusion of Respondents, brought the underlying action for injunctive relief and for actual punitive damages against the Respondents herein, jurisdiction for which existed based upon, *inter alia*, the First Amendment.

The Ninth Circuit, in affirming the district court's granting of summary judgment against the Petitioner, held that a compelling governmental interest in preventing diversion of funds raised for certain church projects justified the interference with Petitioner's free exercise rights resulting from the FCC's demands for the donation records of Petitioner. App. B, p. 20. The factual predicate for the Ninth Circuit's finding of the existence of a compelling governmental interest was the Respondent's assertions that there had been "allegations [plural] of fraud", "fraudulent practices [plural] alleged", and that in addition to and apart from Diederich's alleged complaint, the Respondents had conducted "several interviews" in which they received information to support Diederich's allegations. Herein lies the fraud.

The nature of Respondents' fraud is two-fold. The first component of Respondents' fraud was their representations that prior to their September 19, 1977 demands for donor records, there had been allegations of fraud, from numerous complaints received by them, or from numerous complainants or sources. The second was simply their representations that there were allegations of *fraud* or *fraudulent* practices all prior to, and justifying, their September 19 demands for donor records. Both were exposed in Petitioner's motion to vacate judgment for fraud.²

² Motion to Vacate Judgment pursuant to F.R.C.P. 60(b)(3), 60(b)(6), and for Fraud Upon the Court; Declarations of Kenneth E. Roberson and Edward L. Masry in Support thereof; Memorandum of Points and Authorities in Support thereof", filed March 8, 1983 (hereafter, Motion).

The Ninth Circuit was not the only victim of the first fraud. Motion, at 19-20. This very Court was defrauded by similar representations by the FCC in the case of *Faith Center, Inc., Petitioner, v. Federal Communications Commission, Respondent*, No. 82-867, October Term, 1982. Therein the FCC stated in its January 1983 "Brief for the Respondent in Opposition" that

In 1977 the Federal Communications Commission received *complaints* [plural]. . . . The Commission *thereafter* instituted an informal investigation into Faith's operations . . . at 2 (emphasis added),

and

The *complaints* [plural] contained allegations. . . . *Id.*, fn. 2 (emphasis added).

Earlier, in *Faith Center, Inc., Appellant v. Federal Communications Commission, Appellee*, Nos. 81-1648 and 81-1649, the D.C. Circuit was similarly defrauded. For the FCC, in its December 1981 "Brief for Federal Communications Commission", stated that

. . . [There were] *charges* that the licensee had fraudulently solicited . . . at 1 (emphasis added),

that

. . . [There were] *charges* that a broadcast station licensed to a religious organization had been used for the purpose of fraudulently soliciting funds from the public." at 2 (emphasis added),

and, significantly, that

In 1977, the FCC instituted an information investigation into Faith's operation of KHOF-TV *after* the agency received a *number of complaints*. . . . at 4 (emphasis added).

Indeed, in its nationwide "News" fact sheet released April 21, 1982, the FCC falsely stated that

The FCC began an investigation into Faith Center's operation of KHOF-TV (Channel 30), San Bernardino, California, *after* receiving *complaints* [regarding solicitations] and that the solicitations included false statements. (emphasis added).

The Respondents represented the above to the Ninth Circuit also. As earlier stated, the Ninth Circuit found that there had been "allegations [plural] of fraud", "fraudulent practices [plural] alleged", and that, in addition to Diedrich's alleged complaint

before [the Respondents] sought to inspect church records [the Respondents] conducted *several interviews* in which they received information to support Diedrich's allegations. App. B, pp. 15, 17-21 (emphasis added); Motion, at 21.

The Ninth Circuit relied, *inter alia*, upon the representations of Respondent Rosenberg. In his "Affidavit", Exhibit "A" to the Respondents' "Motion to Dismiss, or in the Alternative for Summary Judgment"³ Respondent Rosenberg stated, under penalty of perjury, that the sequence of events was: (1) the Commission received Diedrich's complaint and interviewed him (p. 2, ¶3); (2) subsequently, Rosenberg and another FCC employee "conducted a number of interviews" in which they received further "allegations" (*Id.*, ¶4); and (3) only *after* the above did they arrive at Faith Center and demand church records (*Id.*, ¶15).

Nor was the Ninth Circuit the only victim of the second fraud, namely, that there were allegations of fraud or fraudulent practices. Motion, at 19-20. The above quotations evidencing the Respondents' misrepresentations with re-

³See, "Affidavit" of Joel Rosenberg, March 24, 1979, pp. 2-3; Appellant's "Excerpt of Record" at 49-50.

spect to the number of complaints also evidence that the Respondents claimed that those complaints were of fraud. Further, before the Ninth Circuit, the Respondents, in their "Brief for Appellees", declared that Diederich alleged by his letter that the licensee "had committed false and fraudulent practices" (at 3). Thus, the Ninth Circuit relied upon Respondents in concluding that there were "allegations of fraud", "fraudulent practices alleged", and "several interviews" supporting the allegations of "fraud".

The motion to vacate judgment for fraud upon the Ninth Circuit indisputably showed (1) that the FCC Respondents had received, not "numerous complaints" but a *single* complaint from Diederich, and (2) that that complaint did not allege fraud. The Petitioner's motion further proved that (3) no other complainants existed prior to September 19, (4) that the Respondents did *not* conduct "several interviews" prior to their demands for church records but only *one* and that of Diederich, (5) that *after* their September 19 demands they did not receive further complaints nor conduct "several interviews," but instead *solicited* statements from but a single interviewee whom *they* sought out, and (5) that that interviewee, Joseph Baumgartner, fired from Faith Center for embezzlement, *denied* under oath that he ever accused Petitioner or Faith Center of fraud. Motion, at 22-26.

Specifically, despite substantial resistance, the Respondents were forced to reveal the sources for their statements that there were numerous allegations, etc., made against Petitioner. In their "Broadcast Bureau's Response to Motion to Compel Answers", dated March 23, 1979 in FCC hearing proceedings involving the church's KHOF-TV license, *the FCC's sole sources were quoted as being*

... statement of Joseph Baumgartner dated September 20, 1977 (...) Letter of Paul Diederich dated August 8, 1977; statement of Diederich dated September 15,

1977. Motion, at 22-23.

With the benefit of the above, then it is clear that *prior* to the September 19 investigation, there was but *one* complaint from but *one* complainant, the August 8, 1977 letter from Diederich. The later September 15 statement of Diederich was a follow-up statement taken by the Respondents after this complaint. Moreover, the later September 20 statement was not a complaint, but a statement solicited by Respondents, and again, it was solicited after the demand for donor records. Motion, at 23. These facts flatly contradicted the earlier position of Respondents that there were, prior to the demands of the FCC for Petitioner's records, "numerous allegations", "numerous complaints", "charges" or "several interviews".

Diederich's letter did not allege fraud. For example, in the instant case U.S. Magistrate Ralph J. Geffen, after having specifically reviewed that letter, explicitly declared that it did not allege either fraud or fraudulent practices as having occurred. Motion, at 24. In fact, a cursory reading of the letter revealed that "fraud" or "fraudulent practices" were *nowhere to be found*. Motion, Exhibit "B".

Moreover, Diederich had himself under oath testified that (1) although certain specific projects had not been completed prior to his firing in January of 1977, he had no knowledge as to whether Faith Center subsequently completed them,⁴ (2) he had no knowledge or reason to believe that Dr. Scott had misused Faith Center's broadcast license for monetary

⁴"Reply to Opposition to Motion to Vacate Judgment," filed March 22, 1983 (hereafter, *Reply*), at 13. In substance, Petitioner proved without challenge from Diederich's deposition that the reason he stated that the "projects" were never undertaken though funds were raised was that he had been fired *after* the monies were received but *before* he could have seen them expended.

or personal gain,⁵ and (3) he had no information, knowledge, or belief that Faith Center had defrauded its listening audience.⁶ And, Diederich further testified that he did not believe, *or allege in his August 1977 letter*, that fraud had occurred, and testified that after having worked for over a year with Dr. Scott, he had never seen him do a dishonest act. Motion, Exhibit "D". Finally, Diederich himself cross-complained against the Respondents for their misrepresenting him as accusing Petitioner or his church of fraud, and filed an amicus brief before this Court in support of Faith Center's attempt to obtain its license back after its fraudulent dismissal.⁷ Motion, at 26; Reply, at 11-12.

Turning to Mr. Baumgartner's statement of September 20, for reasons above stated it could not have been relied upon as having occurred prior to the Respondents' demands for donor records, or during one of the (non-existent) "several interviews" conducted prior to the Respondents' demands. Petitioner's motion demonstrated (as did the Respondents' silence on this point) that Baumgartner denied

⁵*Faith Center, Inc. v. Federal Communications Commission*, Nos. 81-1648 and 81-1649, D.C. Circuit, *supra*, Transcript of Paul Diederich, October 10, 1979, at 86-87, 96-97; 9 Joint Appendix 2150-2151, 2160-2161.

⁶*Id.*, Jt. App. 2160.

⁷In an amazing example of the perfidy of blatant fabrications by the Respondents that have polluted these proceedings, the Respondents, through Assistant U.S. Attorney Peter Osinoff, stated that counsel for Petitioner herein and other counsel for Faith Center had engaged in collusion with Diederich. The Respondents proffered as evidence their charge that Diederich "neither answered nor moved to dismiss" the complaint served upon him by Petitioner, and the charge that counsel for Petitioner herein had represented Diederich in his amicus brief before this Court. When, however, Petitioner supplied a conformed copy of Mr. Diederich's answer (on file in the very same building in which the Assistant U.S. Attorney worked) and an affidavit from Parker and Son, Ltd., printers of Mr. Diederich's amicus brief, that the placing of the name of counsel herein on Diederich's amicus brief had been their printing error, even sheepish apologies were not forthcoming. Reply, at 11-12.

ever having accused Petitioner of fraud.⁸

Faced with the above, namely, that there were not numerous individuals who complained of fraud, the Respondents (1) admitted that "fraud" and/or "fraudulent practices" were *nowhere* to be found in Diederich's letter,⁹ (2) conceded that it was *they* who had "characterized" Diederich's statements as charging fraud, Opposition, at 5, and then, unable to refute Petitioner's proof that there were not numerous complainants or several interviews, (3) shamefully attempted to argue that the numerous allegations were all to be found in the single letter of Diederich. *Id.*¹⁰

⁸Despite FCC resistance, the deposition of Joseph Baumgartner was ultimately taken. See "Transcript of Deposition of Joseph Baumgartner, October 10, 1979" on file in *Faith Center, Inc.*, D.C. Circuit, *supra*. Mr. Baumgartner made it absolutely clear in said deposition that the FCC investigators had *sought* him out to obtain a statement (Trans., pp. 7, 8, 12; 9 Joint Appendix 2178, 2179, 2183), that he had not told Commission investigators that monies collected for specific purposes had not been expended in the manner specified (Trans., p. 7; 98 Jt. App. 2178), that while most of the funds had not been used prior to his termination, he had been unable to tell the investigators whether or how the funds had been used in intervening months (Trans., pp. 8, 12-16; 9 Jt. App. 2179, 2183-2187), and that he knew of no actions taken by the church or Petitioner with the intention of defrauding its listeners (Trans., p. 117; 9 Jt. App. 2287).

⁹"Opposition to Motion to Vacate Judgment", filed March 14, 1983 (hereafter, Opposition), at 5.

¹⁰During discovery in a related case those Respondents who were deposed were capriciously instructed by FCC Chairman Mark S. Fowler to limit their answers to specified areas despite the liberal range of inquiry under federal discovery procedure, and he imposed totally irrelevant FCC rules and discovery procedure upon these *federal court* proceedings. Each of the Respondents were then instructed not to answer virtually every question posed to them, to hide the wrongdoing only partially described herein.

REASONS FOR GRANTING THE WRIT.

I. Introduction.

The present case involves more than simply an attempt to redress the grievous assault by members of an administrative agency upon the religious freedoms of a donor giving in secret according to religious conviction. The grief of Petitioner is understood only by recitation of the following.

The role of the federal government in securing the long overdue enjoyment by minorities of their federal civil rights stands in stark and ironic contrast to the treatment afforded to date by much of the same government in vindicating Petitioner's religious freedoms. For, by way of oversimplification, said government transcended anti-black animus which created barriers among men to the securing of those unalienable liberties with which they as equals were endowed by their Creator, the federal government willing to respond to the cries of leading churchmen in the ordering of state/individual relationships. Yet, the same federal government has yet been unwilling to acknowledge a far more malignant cancer creating a barrier between God and man in the exercise of that paramount liberty to worship his Creator, when those same cries would affect the ordering of federal/individual relationships.

The cancer that cries for cure is the modern disrespect for the church and churchmen, a symptom of which is the nearly irrebuttable presumption of immorality that attaches to either when accused, however spuriously or spitefully, of wrongdoing. Whether Hollywood's Elmer Gantry is a cause or symptom of this presumptive bias, holding all the church world accountable for bad eggs like a Communist Jim Jones that exist in any field of endeavor is akin only to making Jesus responsible for Judas's choice, or, for that

matter, holding all federal employees morally responsible for Watergate. And, ironically, as is the nature of those harboring the most deep-seated biases, those the quickest to claim immunity are those likely to be affected the most.

It follows, then, that when some government officials (who often have greater ease accepting a view of preachers and churchmen as meek and bespectacled instead of like the Christ who, if he did today what he did centuries ago in the temple, would be arrested for assault with a deadly weapon) encounter Constitution-respecting churchmen fearlessly asserting constitutional rights that by their nature are assertable only in conflicts with government, said bias will often result in the imputation to the claimant of ulterior motives and a counting of his civil rights as something to be circumvented. Nowhere has the snide assurance that this malignancy will go unchecked found better expression than in the Respondents fraudulently proffering to the Ninth Circuit that there were numerous allegations of fraud supporting their investigation demands.

This case is not simply one seeking reversal of a decision involving egregious factual error. It seeks a remedy to the active fraud perpetrated by federal administrative officials. Thus, this case is extremely important, as it involves the question of whether federal administrative officials may go so far as to effect the violation of Petitioner's rights by perpetrating a fraud upon a court over which this Honorable Court has supervisory power. Additionally, important issues are whether the actions of the Respondents violated due process and/or Petitioner's freedoms under the Religion clauses, and whether the Ninth Circuit further violated due process by denying Petitioner's motion before it without a hearing.

II.

The Respondents Committed Fraud Upon the Court and Violated the Petitioner's Due Process Rights.

The fact that federal courts possess inherent power to review judgments obtained by fraud is settled. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 327 U.S. 575 (1946), *remand* 169 F.2d 514 (3rd Cir., 1948) *cert. den'd.*, *sub nom. Universal Oil Products Co. v. William Whitman Co.*, 335 U.S. 912 (1949). In fact, in *Hazel*, this Court vacated a fourteen-year-old judgment rendered by the Third Circuit pursuant to the inherent power of that court to review fraud. And, significantly, there is no limitation period within which courts must review fraud.

Under Federal Rule of Civil Procedure 60(b) (see App. E) upon motion a court may relieve a party from a judgment for fraud, misrepresentation, or other misconduct of an adverse party, 60(b)(3), and for any other reason justifying relief, 60(b)(6). And, under *Yanow v. Weyerhauser SS Co.*, 274 F.2d 274, 277-278 (9th Cir., 1959), *cert den'd.*, 362 U.S. 919, the Ninth Circuit held that F.R.Civ.P. 60(b) was applicable to proceedings in that court as that rule had been incorporated into its local rules, since under its local rule 8, subdivision 1, 28 U.S.C.A., the Federal Rules of Civil Procedure had been adopted as part of the rules of the court.¹¹

Moreover, where government conduct in federal court is fundamentally unfair, due process applies to correct the injustice.¹² Here, commission by the Respondents of the above-recited fraud has prejudiced both Petitioner and the

¹¹Then local rule 8 is now local rule 5.

¹²E.g., *Alcorta v. Texas*, 355 U.S. 28 (1957) (knowing use of false testimony by government prosecutor).

effective administration of justice in the courts itself.

It is clear from the earlier recited facts that a fraud was committed upon the Ninth Circuit. The facts are (1) prior to the Respondents' demands for Petitioner's donor records, there was but a *single* complaint letter, not numerous "allegations", (2) both U.S. Magistrate Geffen and the so-called complainant denied that the complaint complained of fraud, (3) the Respondents admit that it was they who later characterized Diederich's complaint as one of fraud, and (4) that "fraud" and/or "fraudulent practices" were *nowhere* to be found in his letter. Further, it remains undenied that, contrary to the Respondent's position that there were "several interviews" prior to their demands for donor records, their own records reveal but one: that of Diederich.

III.

The Respondents' Fraud Violated Petitioner's Free Exercise Rights.

The government may restrict religiously motivated action only if a "compelling state interest" is served. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). ". . . [O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations . . ." *Id.* The government must also show that no alternative means exists that would achieve its end without infringing First Amendment rights. *Id.* at 407.

It is of course clear that the Ninth Circuit conceded that Petitioner's free exercise rights were interfered with, App. B, p. 17, necessitating the existence of a compelling governmental interest, App. B, p. 20, which the court found in the prevention of crime.¹³ Inasmuch as the factual pred-

¹³Of course the reality is that the FCC has no jurisdiction to prosecute crime, which is a function of the Justice Department. And the court assumed without analysis that the interest of an administrative agency in investigating licensee activities was equivalent to that of prosecutors investigating crime.

icate for the court's finding of a compelling government interest was utterly non-existent, Petitioner's free exercise rights were in fact violated.

IV.

Denial of Petitioner's Motion Without Even a Hearing Violated Procedural Due Process.

Procedural safeguards of notice and a hearing are required as the precondition to government action having more than a "de minimis" impact on individual rights. *Goss v. Lopez*, 419 U.S. 565 (1975). If in *Goss*, the 10-day suspension of a student from school was not *de minimis*, surely proven violations of Petitioner's free exercise and due process rights and proof of fraud upon the court warrant at least a hearing before the Ninth Circuit. This Court has often recognized that "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Thus a hearing before the Ninth Circuit, or at least remand to the District Court for such an evidentiary hearing and/or opportunity to argue the matter, should have been permitted.

Conclusion.

For each of the above reasons, including the power of this Honorable Court to *supervise* the administration of appellate justice, Supreme Court Rule 17(a), a writ of certiorari should issue to review the order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Reverend W. Eugene Scott, Ph.D.

APPENDIX A.

Order.

EXHIBIT A.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant,
vs. Joel Rosenberg, et al., Defendants-Appellees. No.
81-5387. D.C. No. CV 78-3132 AAH.

Filed: April 13, 1983.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE, SCHROEDER and CANBY,
Circuit Judges

Appellant's Motion to Vacate Judgment and Motion for Stay are denied.

APPENDIX B.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant,
vs. Joel Rosenberg, et al., Defendants-Appellees. No. 81-
5387. D.C. No. CV 78-3132 AAH.

Filed: January 21, 1983.

Appeal from the United States District Court for the Central
District of California.

Andrew A. Hauk, District Judge, Presiding. Argued and
Submitted March 3, 1982.

BEFORE: WALLACE, SCHROEDER, and CANBY,
Circuit Judges.

WALLACE, Circuit Judge:

Scott, the president and pastor of Faith Center Church (the church), brought this action for injunctive relief and for actual and punitive damages against five present and former officers and employees (the government employees) of the Federal Communications Commission (the FCC), alleging that they violated his first amendment rights during an investigation of the church's television and radio stations. The district court granted summary judgment for the government employees. We affirm.

I

Diederich, a former employee of one of the church's television stations, sent a letter to the FCC in which he alleged that Scott had solicited during broadcasts and subsequently received funds for projects which were never undertaken. He also stated his belief that Scott was using the stations for his personal gain. In response to that letter, the FCC instituted an investigation of the church's California television and radio stations. The FCC conducted a number

of interviews during which further allegations were made: that the stations had failed to log paid religious programming as commercial broadcasting, that Scott had misstated the amount of his personal remuneration during broadcast solicitations, and that Scott had made personal pledges during the broadcasts which he had never fulfilled.

Subsequently, two FCC employees made an unannounced visit to the television station located in the main church building to interview employees and investigate records. There is some dispute with respect to how clearly they identified the purpose of their visit and with respect to the scope of their request for access to church and station records. In any event, the church subsequently made available some, but not all, of the materials requested, and thereafter the FCC issued an order designating for hearing the station's application for license renewal and a notice of apparent liability for forfeiture for violation of 18 U.S.C. § 1343, the statute governing fraud by use of radio and television. The record does not indicate the status of the proceedings pertaining to that order. The church has apparently sought relief both before the FCC and in the courts. Those claims of the church, however, are not before us. Scott brought this action not in any representative capacity, but to vindicate his individual rights. He apparently does not, in his personal capacity, contest the FCC's request for station logs and for his salary records. He does, however, allege that the FCC's inquiry into his personal donations violates his free exercise rights under the first amendment.¹ Scott's claim that his religion requires donations to be made confidentially if they are to be received by God as sacrifices is not disputed.

¹Scott also claimed a deprivation of his fourth, fifth and ninth amendment rights, but cited no supporting authority. We find these claims frivolous.

The questions presented by this appeal are whether Scott has standing to bring this action; whether Scott has a legal basis for his claim under 42 U.S.C. § 1983, under 42 U.S.C. § 1985(3) or directly under the first amendment; whether the FCC employees violated Scott's first amendment rights; and, if so, whether the FCC employees are entitled to immunity. Summary judgment was appropriate because there is no genuine issue as to any material fact.

II

The government employees argue that Scott lacks standing to bring this action because the FCC investigation was directed towards the station and not Scott, and because the FCC requested only church records and none of Scott's personal records. We hold, however, that Scott has standing to assert his claim.

Article III of the Constitution limits the judicial power of the United States to the resolution of actual cases and controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ____ U.S. ___, ___, 102 S. Ct. 752, 757 (1982) (*Valley Forge*). A part of this article III requirement is the doctrine of standing. *Id.* at ___, 102 S. Ct. at 758. The "gist of the question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). At a minimum,

Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979), and that the injury

“fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision,” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 1924, 1925, 48 L. Ed. 2d 450 (1976).

Valley Forge, supra, ____ U.S. at ___, 102 S. Ct. at 758 (footnote omitted); *see Larson v. Valente*, 456 U.S. 228, ___, 102 S. Ct. 1673, 1680-83 (1982) (church, as well as its individual followers, had standing under article III to challenge state law requiring religious organizations that received more than half their total contributions from non-members to register and report to the state).

But even meeting this article III threshold for standing may be insufficient to gain access to the federal court for redress of certain claims. The Court has also articulated several prudential requirements which limit the category of persons who may invoke the powers of the federal judiciary. When the plaintiff’s “asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *accord Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-27 (1974). In addition, the “Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin, supra*, 422 U.S. at 499; *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam).² Under these prudential

²There are certain other prudential limitations on standing which are applied in appropriate circumstances. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976) (the interest of the plaintiff must at least be “‘arguably within the zone of interests to be protected or regulated’ by the statutory framework within which his claim arises,” quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

principles, the judiciary seeks "to limit access to the federal courts to those litigants best suited to assert . . . particular claim[s]" and "to avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 9-100 (1979).

We conclude that Scott meets the constitutional requirement for standing. The FCC requested church records of Scott's donations. Scott alleges that his religious beliefs require that his giving be secret if it is to be efficacious. The government employees do not deny that this is a tenet of Scott's faith. Scott, therefore, may properly allege injury from disclosure of his donations. If the FCC has already procured the requested records, the alleged injury may be actual. If the FCC has not yet received the documents, but continues to threaten the church with a loss of its license for failure to produce them, the alleged injury is at least threatened. Therefore, the injury aspect of article III standing is met.

The second constitutional standing requirement is that the injury be traceable to the government employees' action. Here, it is. The church has not and apparently will not release the records voluntarily. But for the FCC's actions, no injury or threat of injury could have occurred. The government employees argue that if they have interfered with any first amendment rights, they are the rights of the church, for no request has been made of Scott personally. Superficially, the argument is plausible, but the law is otherwise. When a governmental demand "imposed on one part causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not . . . deprive the person harmed of standing to vindicate his rights" if he can establish that "the asserted injury was the consequence of the defendants' ac-

tions, or that prospective relief will remove the harm.” *Warth v. Seldin, supra*, 422 U.S. at 505; *see United States v. SCRAP*, 412 U.S. 669 (1973); *Roe v. Wade*, 410 U.S. 113, 124 (1973).

The final requirement for article III standing is that a favorable decision would prevent or redress the injury. Scott alleges and we assume, *see Part V, infra*, that he may be entitled to damages if he has suffered a violation of his first amendment rights. Furthermore, if the action of the government employees threatens future violation of his first amendment rights, he is entitled to injunctive relief prohibiting their demands on the church for his donation records. A favorable decision would prevent or redress Scott’s injury.

Scott therefore meets the constitutional requirements for standing. We turn now to the prudential requirements. His asserted harm is a particularized grievance, namely, the threatened or actual dissemination of his personal donation records, and he asserts his own legal rights and interests under the Constitution, not those of the church or of any third person. *See generally United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953); *Tileston v. Ullman, supra*, 318 U.S. at 46. The mere fact that the records which have been or may be taken are church records does not mean that the intrusion could violate only the church’s rights. *See NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958). Thus, Scott has standing in this case. We therefore turn to the merits of his claims.

III

Shortly after the FCC initiated its investigation, the Attorney General of the State of California began an investigation of similar allegations pursuant to then-effective California law. Scott alleges that the government employees

engaged in a series of telephone conversations and written communications with California officials, and thus participated in the state inquiry, including the state subpoena of church records, in violation of 42 U.S.C. § 1983. We assume for purposes of this appeal that federal employees, like private citizens, can act "under color of state law" and may be liable under section 1983 if they conspire with or participate in concert with state officials who, under color of state law, act to deprive a person of protected rights. *See Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (per curiam); *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969); *Peck v. United States*, 470 F. Supp. 1003, 1007 (S.D.N.Y. 1979).

Nevertheless, even when properly viewed in the light most favorable to Scott, the materials submitted in support of and in opposition to the motion for summary judgment present no genuine issue of material fact which can assist him. At most, the government employees requested information from, offered to exchange, and did exchange information with the California attorney general's office by means of which the two agencies assisted one another. The government employees denied by affidavit that they either instigated the state investigation or requested that state investigators procure information for them. Scott produced no evidence to the contrary. Therefore, Scott has raised no genuine issue of material fact which might support his claim for relief under section 1983. *See Angel v. Seattle-First National Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *Marks v. United States*, 578 F.2d 261, 262-63 (9th Cir. 1978).

The state investigation, including the state subpoena of church records, is the only state action alleged in the complaint. We conclude that the FCC officers were not "willful participant[s] in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966) (constru-

ing 18 U.S.C. § 242), simply because they may have furnished some information which facilitated the state investigation. Any FCC request for and receipt of information gathered by the state officials in the course o. their independent investigation did not constitute action under color of state law. It is true that “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)), *overruled on other grounds*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978). But even if we assume that the state officials violated Scott’s first amendment rights in the course of their investigation, the mere fact that they may have shared with the government employees information unlawfully procured does not mean that the government employees acted under color of state law. If the government employees requested information from the state in this case, they acted under power possessed by virtue of *federal* law. If they obtained that information, it was because they were clothed with the authority of *federal* law. This, without more, is not enough to establish that their conduct was under color of state law. *See District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973).

IV

Scott also alleges that the government employees conspired with the California officials and with the church’s ex-employees to deprive him of equal protection of the laws in violation of 42 U.S.C. § 1985(3). It may well be that a claim based upon a conspiracy to violate a protected right of religion could be stated pursuant to section 1985(3). *See Life Insurance Company of North America v. Reichardt*,

591 F.2d 499, 505 & n.15 (9th Cir. 1979). In this case, however, Scott has stated no claim for relief under the statute.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that section 1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. Rather,

[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id. at 102 (footnotes omitted, emphasis in original). Scott has alleged no class-based, invidiously discriminatory animus for the alleged conspiracy. He has not alleged that the government employees deprived him of his first amendment rights because of his church membership or because he is one of a group holding certain religious beliefs or that the FCC action was in any other way class-based. He has failed to allege any facts from which we might infer a class-based animus. We therefore conclude that he has failed to state a claim for relief under the statute. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *Life Insurance Company of North America v. Reichardt*, *supra*, 591 F.2d at 505; *Prochaska v. Fediaczko*, 473 F. Supp. 704, 709 (W.D. Pa. 1979) (conspiracy directed only toward the individual exercise of first amendment rights does not state a cause of action under section 1985(3)).

V

We must next decide whether Scott has a claim under the first amendment and, if so, what type of remedy is appropriate. We learned from the Supreme Court in *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (*Bivens*), that a person whose fourth amendment rights have been violated by federal officers has a legal claim implied directly under the fourth amendment and is entitled to recover money damages for his injuries. The same right was extended to a claim arising from a violation of the fifth amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and to a claim arising from a violation of the eighth amendment in *Carlson v. Green*, 446 U.S. 14 (1980). The question before us is whether, as with the fourth, fifth, and eighth amendments, a claim also arises under the Constitution for violations of first amendment rights by federal officials.

Ordinarily, a right of action for damages against government officials is given birth by statutory mandate. *See Bivens, supra*, 403 U.S. at 427-30 (Black, J., dissenting). The right of action judicially created in *Bivens* must accordingly be treated as an exception. That exception, however, is not limited to the fourth amendment. *See Davis v. Passman, supra*, 442 U.S. at 248. Indeed, the Court has expanded it to a principle of constitutional liability in very broad language:

At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Id. at 242.

While this analysis assists us with the disposition of this appeal, it is not necessary, as will soon be clear, for us to decide the ultimate issue of whether the first amendment provides a right of action. It is clear, however, that if first amendment rights are justiciable, then Scott is among "the class of litigants who allege that their own constitutional rights have been violated." *Id.* There has been no suggestion by the government employees that Scott is not among those "who at the same time have no effective means other than the judiciary to enforce these rights." *Id.* We assume, without deciding, that a private cause of action may be implied directly under the Constitution for violations of the first amendment. *See Trapnell v. Riggsby*, 622 F.2d 290, 294 (7th Cir. 1980); *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Paton v. La Prade*, 524 F.2d 862, 869-70 (3d Cir. 1975).

Our next question is whether damages is an appropriate form of relief. In *Davis v. Passman*, the Court stated that "'*Bivens . . . holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.'*'" 442 U.S. at 245; *see Butz v. Economou*, 438 U.S. 478, 503-04 (1978). Holding that relief in damages was appropriate for violations of the due process clause of the fifth amendment, the Court identified the following policy factors as pertinent areas of inquiry: whether damages have been regarded historically as the ordinary remedy for the injury alleged, whether relief in damages would be judicially manageable, whether there are available alternative forms of judicial relief, whether evidence suggests that a damages remedy is contrary to the will of Congress, and whether such a remedy would open the courts to

a deluge of claims. 442 U.S. at 245-48.

Once more, however, it is unnecessary for us to decide whether these factors favor a damages remedy for violations of the free exercise clause by federal officials. We assume without holding that Scott is entitled to recover damages if his first amendment rights have been unjustifiably violated, *see Trapnell v. Riggsby, supra*, 622 F.2d at 294; *Dellums v. Powell, supra*, 566 F.2d at 194-95; *Paton v. La Prade, supra*, 524 F.2d at 869-70, and may be entitled to injunctive relief from a threat of a violation.

VI

We must next examine the record to determine if there is any genuine factual dispute whether the government employees violated Scott's first amendment rights. Scott alleges that the government employees informed the press and public that they were investigating charges of fraud against Scott. He claims that those statements interfered with the free exercise of his religious obligation to convert others to his beliefs. He also argues that the FCC's demand, in conjunction with its investigation, that the church provide records of his personal pledges during 1976 and 1977, together with information showing the status of those pledges (paid, withdrawn, or outstanding) violates the free exercise clause of the first amendment.

In support of their motions for summary judgment, the government employees submitted affidavits in which they stated that they did not provide any information to the press or public with respect to the specific allegations made against the church. They further testified that they made no statements to the press or public accusing Scott of any criminal or dishonest activity. Scott introduced letters prepared by two of the government employees in response to public and congressional inquiries concerning the investigation. Those

letters simply confirm that an investigation was in progress and that it was initiated in response to a complaint alleging irregular conduct. The letters further clarify the FCC's responsibility to investigate such complaints, including possible questions concerning the complainant's credibility. The letters do not, however, support Scott's allegations that the government employees dispatched charges of fraud to the press and public. Scott's allegations are unsupported by a factual presentation. Merely conclusory, they are insufficient to survive the government employees' motion for summary judgment. *Angel v. Seattle-First National Bank, supra*, 653 F.2d at 1299; *Marks v. United States, supra*, 578 F.2d at 262-63.

Scott's second argument about the investigation of his pledges presents more difficult questions. It is complicated by the fact that the church owns the broadcast station. Our analysis must be on two levels first, the result of the actions of the FCC in relation to the station and second, the result of its actions in relation to Scott.

We start with the proposition that first amendment analysis may be different for broadcasters than for members of other types of media. A greater degree of conflict with traditional first amendment principles is tolerated with the broadcast media because of the limited number of available frequencies. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383, 386-89 (1969) (broadcast frequencies are a "public trust"; "differences in the characteristics of [the broadcast] media justify differences in the First Amendment standards applied to them."); *see Buckley v. Valeo*, 424 U.S. 1, 49 n. 55 (1976) (per curiam) (distinguishing broadcast media cases from traditional free speech cases); *Columbia*

Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973) ("*Red Lion Broadcasting Co. v. FCC* makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case.")) (citation omitted); *cf. Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 375 (fairness doctrine "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment"). The first question, therefore, is should the FCC be required to meet a different standard prior to investigation of broadcasters of religious programs than it is required to meet prior to investigation of broadcasters of secular programs? More specifically, should the FCC be required to demonstrate a compelling governmental interest prior to investigating an allegation of fraud by one of its licensees that is owned by or affiliated with a religious organization? We hold that such a requirement is not necessary.

The Federal Communications Act authorizes the FCC to regulate as required by the "public convenience, interest, or necessity," 47 U.S.C. § 303, and does not differentiate types of broadcast licensees. The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters. *See, e.g., In re PTL of Heritage Village Church & Missionary Fellowship, Inc.*, 7 F.C.C.2d 324 (1979). In addition, courts have approved the application of FCC rules to religious groups on the same basis as applied to secular groups. *See Red Lion Broadcasting Co. v. FCC, supra* (fairness doctrine applied to broadcast of a religious program without distinguishing religious and secular broadcasting); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974) ("But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'"), *cert. denied*, 419 U.S. 996 (1974); *accord Brandywine-Main Line Radio, Inc.*

v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Trinity Methodist Church v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); *Hardy & Secret, Religious Freedom and the Federal Communications Commission*, 16 Val. U.L. Rev. 57 (1981).

Requiring the FCC to justify investigations undertaken in response to allegations of fraud by one of its licensees, religious or secular, is not supported by precedent, is impracticable, and might raise other first amendment obstacles. *See, e.g., Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). Allowing such an investigation of a broadcast station, however, does not necessarily mean that the investigation may be open ended. During the investigation, free expression conflicts may arise. This brings us to the second level of our analysis which pertains to the acts of the FCC in relation to Scott. When a collision between portions of an FCC investigation and free exercise rights occurs, free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest. A compelling governmental interest must be shown at that point because an action taken in the course of an investigation directly conflicts with a sincerely held religious belief. *See generally EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) (government's compelling interest in ensuring equality in employment opportunity justified burden on exercise of religious publisher's policy prohibiting suits by members against the church).

Here, we conclude that it is necessary to employ compelling state interest analysis because of the unique factual setting. The FCC requested information, the release of which

Scott alleges in and of itself violates his religious free exercise right. Thus, there is a direct conflict between a sincerely held religious belief and an action by government officials. As stated by the Fifth Circuit in examining employment policies at a religiously-affiliated college, "the relevant inquiry is not the impact of the [government action] upon the institution, but the impact of the [government action] upon the institution's exercise of its sincerely held religious beliefs." *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Therefore, we conclude that we can affirm the district court's order granting summary judgment only if the FCC's demand for the records of Scott's donations does not infringe on his first amendment freedoms or, if it does, a compelling governmental interest justifies the demand. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); *see Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). *Id.* at 215.

In support of his claim, Scott submitted personal affidavits in which he states that he believes that his church contributions are "sacrifices" and that disclosure of his sacrifices would violate their sacred nature. The government employees do not challenge the sincerity of Scott's beliefs. *See generally United States v. Ballard*, 322 U.S. 78 (1944). Furthermore, Scott's claim is not "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Board of the Indiana Employment Security Division*, 40 U.S. 707, 715 (1981) (*Thomas*). We therefore conclude that the FCC's demand interferes with Scott's first amendment rights.

The conclusion that there is conflict between Scott's beliefs and the demand imposed by the FCC is "only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." *United States v.*

Lee, __ U.S. __, __, 102 S. Ct. 1051, 1055 (1982); *see Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The state may justify its infringement on religious liberty if it is necessary to accomplish an overriding governmental interest. *United States v. Lee*, *supra*, __ U.S. at __, 103 S. Ct. at 1055; *Thomas*, *supra*, 450 U.S. at 718; *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215; *Sherbert v. Verner*, *supra*, 374 U.S. at 406; *see also EEOC v. Pacific Press Publishing Association*, *supra*, 676 F.2 at 1279 ("In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest . . . , and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."). We must therefore determine whether the governmental interest in preventing the fraudulent practices alleged is sufficiently compelling to justify the burden upon Scott's right to the free exercise of his religion and, if so, whether the demand for church records of Scott's pledges and donations was necessary to further that interest. Whether a governmental interest is or is not compelling is a question of law. *See United States v. Lee*, *supra*, __ U.S. at __, 102 S. Ct. at 1055-56; *Thomas*, *supra*, 450 U.S. at 718-19.

The governmental interest in preventing some crimes is compelling, *see Prince v. Massachusetts*, *supra*, 321 U.S. at 166-67, but that interest is not sufficient to permit interference with free exercise rights in every case. *See Wisconsin v. Yoder*, *supra*, 406 U.S. at 215. The Supreme Court has repeatedly stated that religious frauds can be penalized. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (dictum) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may,

with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."); *Schneider v. State*, 308 U.S. 147, 164 (1939) (dictum) ("fraudulent appeals may be made in the name of charity and religion . . . [which] may be denounced as offenses and punished by law"); *see United States v. Ballard, supra*, 322 U.S. at 95 (Jackson, J., dissenting) ("religious leaders may be convicted of fraud for making false representations on [some] matters . . . as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes"). Lower courts have applied this principle to religious organizations conducting fraudulent non-religious activities. *see SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976), *disapproved on other grounds*, *Aaron v. SEC*, 446 U.S. 680, 687 n. 7 (1980), and to individuals soliciting money for pretended religious purposes when religious beliefs were not sincerely held, *see People v. Estep*, 346 Ill. App. 132, 104 N.E.2d 562, *writ dismissed*, 413 Ill. 437, 109 N.E.2d 762 (1952), *cert. denied*, 345 U.S. 970 (1953); *People v. Le Grande*, 309 N.Y. 420, 131 N.E.2d 712 (1956), and have concluded that the protections of the first amendment were not applicable.

Here, however, we face the question whether, when an allegedly fraudulent activity is connected with the exercise of sincerely held religious beliefs, the governmental interest in preventing fraud overrides the individual's right of religious freedom. We conclude that the answer depends, at least in part, on the nature of the fraud. We recognize that the protections of the free exercise clause do not "turn upon a judicial perception of the particular belief or practice in question. . . . Courts are not arbiters of scriptural interpretation." *Thomas, supra*, 450 U.S. at 714, 716; *cf. United States v. Ballard, supra* (courts may inquire into sincerity,

but not truth or falsity, of religious tenets). This case does not involve only an allegation that Scott made certain pledges during his broadcast, but failed to pay them. The FCC investigation centered on allegations that Scott had solicited funds for certain specific projects which had never been undertaken. *See id.* at 95 (Jackson, J., dissenting). Scott claims that in the framework of his religion, it is only important that the contributor give and, having made the gift, the contributor is spiritually blessed, not matter how his donation is used. Scott further states that he must follow "the leanings of the Lord" with respect to the utilization of donations. Scott does not claim, however, that contributors to identified projects know that their contributions may be used for any purposes which Scott determines to be in accordance with the will of the Lord. Scott does not claim that he clarified this aspect of his religious practice in his broadcast solicitations. At least under these limited circumstances, we conclude that the government has a compelling interest in preventing the diversion of funds from the specifically identified projects for which they have been solicited.

Our final inquiry is whether the government's investigation of Scott's pledge and donation records was necessary to further this compelling interest. We need not determine whether any other aspects of the FCC investigation were justifiable, for Scott contests only the FCC demand for those records. Although not every allegation of fraudulent solicitation would justify the government's interference with the religious practices of individuals and churches, we conclude that the allegations here justified the FCC's narrow and limited inquiry into Scott's donation records.

Several important considerations support this conclusion. First, we believe that the context in which the pledges were made is significant. When Scott and the church decided to

acquire television and radio stations, they availed themselves of facilities which, under congressional mandate, must be operated in the public interest. 47 U.S.C. §§ 307(a), 309(a). With respect to the operation of broadcast facilities, the Supreme Court has held that the right of viewers and listeners, not that of broadcasters, is paramount. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 102, *citing Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390; *see also Writers Guild of America, West, Inc. v. America Broadcasting Co.*, 609 F.2d 355, 362 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). An allegation of fraud, even if not sufficiently specific or reliable generally to justify inquiry into solicitations made by a congregation in church, may nevertheless be sufficient to justify inquiry into broadcast solicitations.

Second, the FCC investigation in this case was premised on information sufficiently reliable to justify the limited intrusion on first amendment rights which it engendered. The FCC began its inquiry only after it received a complaint signed by Diederich, a former employee of the television station. In his former employment, Diederich was in a position in which he was likely to have received personal knowledge of the irregularities he alleged. His signed complaint, if knowingly false, could expose him to liability in tort for malicious prosecution, *see, e.g., Morfessis v. Baum*, 281 F.2d 938, 940 (D.C. Cir. 1960); *Hardy v. Vial*, 48 Cal. 2d 577, 580-81, 311 P.2d 494, 496-97 (1957); *Dixie Broadcasting Corp. v. Rivers*, 209 Ga. 98, 70 S.E.2d 734 (1952) (action before FCC), and was therefore entitled to a greater inference of reliability than an unsigned statement would have been. Furthermore, before they sought to inspect church records, the government employees conducted several interviews in which they received information to support Diederich's allegations. Certainly, governmental agencies must

be wary of complaints which cannot be investigated without interfering with first amendment rights. Malicious or unsubstantiated allegations could easily be used to harass unpopular religions and their leaders. We are satisfied, however, that the information upon which the FCC acted was sufficiently reliable to justify its investigation.

Third, the investigation in this case was narrow and avoided any unnecessary interference with the free exercise of religion. We can imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling, but that is not this situation. There was no request for wholesale investigation of the church's financial records, but rather specific requests for records of an FCC licensee concerning Scott's salary and donations, both of which he allegedly misrepresented during broadcast solicitations. The added request, not challenged here, for access to the video tapes of broadcast solicitations and church records detailing the receipt and expenditure of publicly solicited funds also demonstrates the limited focus of the investigation.

Finally, the FCC's demand for access to Scott's donation records was necessary to serve its compelling interest in investigating the alleged diversion of funds. If, as alleged, Scott solicited funds for projects which were never undertaken or if funds contributed to those projects were illegally diverted to other uses, Scott's misrepresentation of his personal pledges may have been intended to induce those contributions and therefore could constitute part of a scheme to defraud. Although other information might be only tangentially relevant to the objectives of a legitimate inquiry, the nexus between the investigations and the FCC's objective in this case was sufficiently close to comply with the principle that valid restrictions on first amendment rights must embody the least restrictive means of effectuating the

government's compelling interest. *See Thomas, supra*, 450 U.S. at 718; *Sherbert v. Verner, supra*, 374 U.S. at 407, citing *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960). *See generally United States v. Lee, supra*, ____ U.S. at ___, 102 S. Ct. at 1056 ('Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' " *quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)) (citation omitted).

VII

Scott also claims that the actions of the government employees violated the establishment clause of the first amendment. He apparently believes that inquiry into his donation record is only the first step in a contemplated program of pervasive regulation. The government employees have submitted affidavits in which they state that their inquiries were for the purpose of ascertaining the truth of Diederich's allegations and determining whether renewal of the church's license was in the public interest. Scott has alleged no facts from which we can infer that pervasive regulation is either planned or threatened. The government employees were therefore entitled to summary judgment on the establishment claim. *Angel v. Seattle-First National Bank, supra*, 653 F.2d at 1299; *Marks v. United States, supra*, 578 F.2d at 262-63.

We hold that the government employees have not unjustifiably violated Scott's first amendment rights, and therefore do not reach the question of immunity. *See generally Butz v. Economou, supra* (absolute and qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity).

AFFIRMED.

APPENDIX C.

Order.

EXHIBIT B.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant,
vs. Joel Rosenberg, et al., Defendants-Appellees. No.
81-5387, D.C. No. CV 78-3132 AAH.

Filed: June 20, 1983.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE, SCHROEDER and CANBY,
Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing, to deny the motion for reconsideration of appellant's motion to vacate, and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, the motion for reconsideration is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D.

Order.

Supreme Court of the United States.

Reverend W. Eugene Scott, Petitioner, vs. Joel Rosenberg, et al. *No. A-181.*

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1983.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of September, 1983.

APPENDIX E.

Provisions Involved.

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

— United States Constitution, Amendment I

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

— United States Constitution, Amendment V

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Office-Supreme Court, U.S.
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ALEXANDER L STEWART,
CLERK

No. 83-570
IN THE

Supreme Court of the United States

October Term, 1982

W. EUGENE SCOTT, PH.D.,

Petitioner,

vs.

JOEL ROSENBERG, *et al.*,

Respondents.

**Brief of the Honorable Mervyn M. Dymally and Mr.
Paul Diederich, Amicus Curiae, in Support of
Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

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Paul Diederich, Amicus Curiae, in Support of
Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

Interest of the Amici.

The Honorable Mervyn M. Dymally and Mr. Paul Diederich join in their support of the Petitioner before this Court. Their respective interests are set forth below.*

The decision of the Ninth Circuit below would make unlimited supervision by the FCC of churches and their finances and unlimited disclosure to the FCC of individual donation records, including donation amounts, the price of receiving religious contributions to a church ministry that broadcasts. It is the belief of the Honorable Mervyn M.

*Both parties consent to the instant amicus brief; copies of letters from counsel for the Petitioner and the Respondents are forthcoming, reciting said consent.

Dymally that the Supreme Court, and not an administrative agency, should resolve the relevant issues, including the limits of government encroachments upon the rights of churches to protect the congregations' and contributors' rights to anonymous giving as a part of their religious belief. As one familiar with the operations of various federal administrative agencies, this belief is further strengthened by the open dissension and confusion with the upper echelon of the FCC itself, as documented hereafter, concerning whether there should be any procedures, rules, or regulations at all governing inquiries into churches or donations to churches.

The interest of Mr. Diederich is to underscore the unconstitutionality of the FCC's investigation into donor records, particularly where it has been proven that the allegations of fraud said to have justified the investigation were never made, and that the 'allegations' themselves were false. Indeed, the interest of Mr. Diederich is singularly important, as he is alleged to have been the first to complain to the FCC of fraudulent practices having been committed by Faith Center and/or Petitioner though in fact he has repeatedly denied ever having made such a complaint, as hereafter documented.

REASONS FOR GRANTING THE WRIT.

The urgent importance of Petitioner's case does not lie simply in the violations of his due process rights and religious freedoms effected by the Respondents' fraud as recited in his petition. Instead, the importance of the instant case is placed in sharper relief by open recognition that the FCC has been unable to contain *overt* acknowledgements from FCC officials themselves of serious misgivings concerning the FCC's performance in regard to their handling of Petitioner and the licensing proceedings involving the church, Faith Center, that he pastors. Particularly at issue is the Mass Media Bureau's handling, or mishandling, of licensees during application renewal proceedings, and Faith Center's in particular. Thus, resolution of the instant case is as necessary to address the confusion within the FCC itself concerning the parameters of, and necessary safeguards to, the proper constitutional exercise of its powers as it is to redress the injury suffered by Petitioner.

For example, Mark S. Fowler, Chairman of the FCC, has publicly stated that there should be

No renewal filings, no ascertainment exercises, no content regulation, no ownership restrictions beyond those that apply to media generally (. . .) no Brownie points for doing this right, no finger-wagging for doing that wrong . . .

he himself demanding to know

. . . What other business is subject to this system? What other business would put up with such a zoo parade, where a businessman's handiwork and life's labor can be snatched away by administrative fiat, like a monkey grabbing a bag of peanuts from a passerby? (. . .) It's the type of dead-of-the-night seizures that may belong in Moscow, but not on Main Street, U.S.A.¹

¹The Los Angeles Daily Journal, Tuesday, October 26, 1982.

Again, Joseph Marino, Chairman of the Review Board of the FCC (immediately subordinate to the full Commission) joining in the opinion of the Board in an unrelated FCC matter before it involving resolution of First Amendment issues, declared

While joining fully in the Board's unanimous decision, this case and the still smoldering controversy in *Faith Center, Inc.* (cite) indicate that *there is a continuing need for the utilization of procedural means which will permit a radio licensee to obtain Commission and Court adjudication of his constitutional rights without putting his license in jeopardy.*

A decade ago then Chairman Dean Burch warned that often the evil sought to be cured by government action "requires the delicate hands of a surgeon. The type of surgery that you [the licensees] can best prescribe—and perform—within your ranks. I fear as you do the hands of the government that will be called upon as a last resort—*the stubby, gauntleted bureaucratic hands that belong on a 3rd string catcher in the minor leagues, not on a public interest physician.*"²

Finally, with the most recent dismissal of Faith Center's KVOF-TV, Channel 38, San Francisco, California broadcasting license, again Chairman Marino amazingly admonished both the Board and the Commission itself that

. . . [T]his is an occasion to think anew and deeper about such cases. Faith Center is now a step closer to losing its third, and possibly fourth, station. . . . Perhaps this raging controversy which began with the licensee's *good faith* assertion of its constitutional rights (cite) might have been contained if a procedural device

²*In the Matter of David Hildebrand. Decision*, FCC 83R-6, released January 26, 1983. (emphasis added)

had been used which permitted the licensee to obtain a final Court adjudication of its constitutional claims without putting all of its licenses in jeopardy. (. . .) Past experience teaches that renewal hearings are not the best vehicles for the adjudication of potential constitutional issues. . . .

Recently, after a preliminary inquiry, the *Commission referred a case containing similar 18 U.S.C. §1343 allegations to the Department of Justice for appropriate action.* A criminal investigation, followed by Grand Jury action and trial in a U.S. District Court, would seem a more appropriate process than a less formal administrative hearing, especially when a licensee pleads its freedom of speech and religion, or Fourth and Fifth Amendment rights. The Commission's recent approach of *deferring to other authorities* makes much common sense whether the licensee is a controversial preacher accused of soliciting in violation of 18 U.S.C. §1343, an amateur operator alleged to have uttered non-obscene but indecent language, 18 U.S.C. §1464, or a commercial broadcaster who has allegedly conspired to fix prices in violation of the Sherman Act, 15 U.S.C. §1. Similarly, the NLRB is in a better position to resolve unfair labor practice charges against broadcasters (cite). Deferring to other authorities is even more appropriate today because the Commission's limited hearing resources are strained by matters which are closer to the core of the agency's primary mission set forth in 47 U.S.C. §151.³

Chairman Marino recognized that the civil administrative process is functionally inappropriate for the skilled adju-

³*In Re Applications of Faith Center, Inc. for Renewal of License for Station KVOF-TV, San Francisco, California, West Coast Broadcasting Co., San Francisco, California, Together Media Ministries, San Francisco, California, LDA Communications, Inc., San Francisco, California, for construction permit, Memorandum Opinion and Order, FCC 83R-47, released July 7, 1983. (emphasis added)*

dication of the delicate constitutional issues that emerged upon administrative investigation of criminal charges in this or any matter. In this regard, it is important to note that *the FCC has not a single rule or regulation governing inquiry into churches.*⁴ Similarly, there are no procedural safeguards protecting one enmeshed in its civil administrative hearing processes, though he shares the same burdens and disabilities of his zealously-protected counterpart in the normal criminal justice system.⁵

The frustration of the FCC officials above-quoted is best understood by the result in the Faith Center matter, notwithstanding the unrebutted exculpatory factual showing made to them by Faith Center. For this showing, made both before and during the ill-suited discovery phase, demonstrated the falsity of any allegations that were made. The uncontradicted refutation of the Respondents' proffered grounds for its investigation, that there were numerous complaints of fraud from numerous complainants, has been dealt with elsewhere. What may go unrealized, however, is the unprecedented amount of evidence and sensitive church information presented to the FCC and the Respondents.

⁴Compare 26 U.S.C. §7605(c) governing the IRS, which completely prohibits examination of the religious activities of an organization or the books of account of such an organization, except to determine whether such organization is a church and to determine the amount of tax, respectively, and then only "to the extent necessary to determine" the above.

⁵Among the safeguards of which the FCC regulations are bankrupt is a preliminary hearing or its functional equivalent. With broad discovery presently allowed in federal courts and administrative proceedings, in which often only the *slightest* relevance is the nexus between information sought and material hearing issues, the licensee is forced to disprove his guilt in a civil context where demonstrations of innocence and demands for probative cross-examination and confrontation of witnesses take a back seat to 'relevance'. And the tragedy of the above is compounded when substantive, 'good-faith' constitutional analysis is eschewed and sacrificed for greater administrative familiarity with such a standard.

Faith Center's first broadcasting license to be dismissed was its license for KHOF-TV, Channel 30, San Bernardino, California.⁶ During the administrative proceedings leading to said dismissal, the Mass Media Bureau⁷ filed its November 9, 1978 "Bill of Particulars."⁸

Of the three evidentiary issues discussed therein, the first two dealt with whether Faith Center had supplied the Bureau with adequate information to investigate the third and *only* substantive issue, which was "whether in its over-the-air fund-raising broadcasts, Faith . . . violated, or is in violation of, Title 18, United States Code Section 1343 [governing wire fraud]."

Paragraph five of that bill set forth the only bases for this substantive issue, issue (c).⁹ The Bureau stated therein that in August 1977, it received allegations

1. that beginning in 1976, Petitioner solicited contributions for specific projects and purposes that were not subsequently carried out, specifically, concerning appeals for the "fountain of faith", audio equipment, studio lights, and roof repair.
2. that monies so raised were misappropriated by Petitioner and funneled to other organizations in which he had an interest; and

⁶In Re Application of Faith Center, Inc., Station KHOF-TV San Bernardino, California, for Renewal of License, BC Docket No. 78-326. Dismissal was affirmed in Faith Center, Inc. v. FCC, Nos. 81-1648 and 81-1649 (D.C. Cir., filed Nov. 24, 1981). "Jt. App." references are to the Joint Appendix filed below in connection with that case in the United States Court of Appeals for the District of Columbia Circuit. A copy of the Joint Appendix has been lodged with the Clerk of this Court. References "App." refer to the Appendix to this amicus brief.

⁷The then Broadcast Bureau.

⁸1 Jt. App. 58.

⁹"Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc.", February 1, 1979, at 5; 1 Jt. App. 94; see also "Broadcast Bureau's Response to Motion to Compel Answers", March 24, 1979, at 8. As will be seen, these two FCC documents themselves revealed that the grounds for investigation were spurious.

3. that fund raising appeals by Petitioner were at times accompanied by false representations that he had personally pledged money or that he received only \$1.00 per year in compensation from Faith Center.¹⁰

Yet, the administrative process was ill-suited to handle Faith Center's conclusive showing that, on the contrary

1. Faith Center not only carried through on all projects and purposes for which funds had been collected, but also, in some instances, spent more than had been raised;
2. Petitioner, having taken a pauper's vow, had no financial or ownership interest in any organization, religious or otherwise; and the only reason funds raised by Faith Center were transferred to another organization was to protect them during litigation proceedings involving Faith Center and a third party.
3. Petitioner honored every pledge he made and in fact, per the vote of his congregation in public meeting, received only \$1.00 per year *plus living expenses* from Faith Center.

As to the first allegation, as early as December 18, 1977, Faith Center sent the Bureau a sworn declaration by a certified public accountant, Gary E. Crane (App. A, pp. 1-6), specifically addressing the four fund-raising projects listed above.

In his report, Mr. Crane (1) thoroughly described, step-by-step, how donation receipts are handled from pledge to deposits; (2) acknowledged that gifts designated to specified 'projects' were infrequent, and that such categories were for informational purposes only and did not dictate the source or disbursement of the particular gifts; (3) stated that the

¹⁰Bill, at 5; 1 Jt. App. 62.

church completed any 'projects', *whether sufficient funds were received or not*, out of its general fund, and; (4) specifically indicated that the church considered the donations gifts, not trusts. App. A, pp. 1-3.

He then recited the purpose of the 'fountain of faith': to memorialize those who responded in faith in helping to pay off the church sanctuary mortgage, for which mortgage debt the funds were raised, noting that the then yet-to-be-completed fountain would be built regardless of the funds received. *Id.*, at 3-4.

With respect to the 'audio equipment', Mr. Crane reported in fashion too detailed for repetition here, receipts of \$5,117 (\$6,823 less 25% for mortgage debt retirement) wholly consumed in \$5,196 worth of audio equipment expenditures. *Id.*, at 4-5. As to 'studio lights', Mr. Crane observed from journals what was in fact the case, *i.e.*, there was no such project; though there had been over \$3,000 of expenditures for bulbs and fixtures. *Id.*

Concerning 'roof repair', Mr. Crane noted that over \$6,000 came in for this 'project'. He also found that inasmuch as the repair involved expenditures falling in different categories, expenditures could not be practicably itemized, though a paper surplus existed in this category, particularly since roof repair was an on-going operation. *Id.*, at 5-6.

Mr. Crane concluded his report, signed under penalty of perjury, by indicating that the cash receipts and disbursement journals contained confidential records, including church school records, sanctuary offerings, and mission projects, but that he was instructed by Faith Center to make specific details available upon receipt of specific charges from the FCC. *Id.* at 6.

Faith Center also supplied the December 16, 1977 sworn affidavit of W. Bernard Marston, Director of Engineering

of Faith Center's station. (App. B, pp. 7-9). Mr. Marston's affidavit provided more detail into the sound and lighting 'projects'. Finally, Mr. Durbin's December 16, 1977 declaration (App. C, pp. 10-15) was supplied to the FCC, recounting still greater detail concerning the roof repairs that were performed by him and those on-going, also reciting the complications that arose in connection with the finally-constructed fountain of faith and the purpose for which it was built: the memorializing of mortgage debt retirement, for which debt retirement the funds were requested.

Placed in the awkward position of attempting to disprove guilt during civil proceedings, Faith Center nonetheless made its good faith clear by the unprecedented submission of nearly 40 pages of accounting/columnar type working papers prepared on a daily basis by a Faith Center bookkeeper from October 1, 1976 to December 31, 1977, the subject period. These were attached to the Faith Center's letter dated July 12, 1978 to the FCC entitled "Religious Offerings to Faith Center". These papers detailed 21 projects engaged in by Faith Center, *i.e.*, 19 in addition to the challenged two (*i.e.*, audio equipment and roof repair only) since the fountain of faith was not, as earlier explained, a project, and since there never was a studio lights project. These papers detailed the amounts received by Faith Center on a daily basis and the projects for which they were given.¹¹ Further still, Faith Center provided the Bureau with an 8-page appendix thereto, entitled "Summary of Money Raised on Sixteen Projects" (App. D, pp. 16-22), which catego-

¹¹The 19 additional projects consisted of piano, telephones, San Francisco travel, Korea, WHCT Travel, 700 Club, Tax Battle, PTL funds, Paul Finkenbinder, Microwave, VTR heads, Korea trip, Klystron Tubes, Moe Company, Outrage Tax Battle, Jake Hess, Hartford Transmitter, Joe Donetz, "The 10 per cent and T.A.B." There was no 'studio lights' project, nor was the fountain of faith a project.

rized for each project (a) amounts raised, (b) the portion thereof expended for the project, and (c) dates and amounts of said expenditures. This summary showed what detailed examination of the working papers and disbursement journal would show: in each project, funds were exhausted for the purposes for which they were raised, except with two where funds not expended were held as restricted funds, and a third project in which but \$39 was retained in the general fund from \$1039 received. The working papers were further supplemented by accounting and check detail supporting the expenditures above. The above data totalled an inch-thick 170 pages, resulting in unequalled disclosure of church financial information to government officials for the sake of preserving the religious freedoms of Faith Center's donors.¹²

Unbelievably, Faith Center submitted itself to additional tests. In March of 1978, it offered to make its personnel available for unrestricted interviews by Commission staff members. In July of 1978, Faith Center furnished the Commission with the lists of past and present employees with addresses, of all of Faith Center's personnel located in the Los Angeles area. And, Faith Center provided photostatic copies of its cash receipts journal. Finally, Faith Center offered to submit to an independent audit of its financial records, though the offer was never accepted. It became clear that no matter what Faith Center proved, the Bureau would remain unsatisfied unless Faith Center turned over private donor records.

This preoccupation was best evidenced by the fact that all of the above accounting data, affidavits, sworn statements, itemizations, etc., were inadequate refutation in the

¹² As early as September 1977, Faith Center supplied over 6 hours of tapes covering the fountain of faith fund raising to pay off the sanctuary mortgage.

FCC's eyes of the so-called allegations made by Mr. Diederich and Joseph Baumgartner. Yet Diederich himself testified that (1) although certain specific projects had been completed prior to his termination in January of 1977, he had no knowledge as to whether Faith Center subsequently completed them,¹³ (2) he had no knowledge or reason to believe that Petitioner had misused Faith Center's broadcast license for monetary or personal gain,¹⁴ and (3) he had no information, knowledge, or belief that Faith Center had defrauded its listening audience.¹⁵ He further testified that he had no way of knowing if the monies received were expended,¹⁶ and revealed that the fountain of faith had in fact been built.¹⁷

Mr. Diederich further testified that he did not believe, or allege in his August 1977 letter, that fraud had occurred.¹⁸ U.S. Magistrate Ralph J. Geffen, after having specifically reviewed that letter, explicitly declared that it did not allege either fraud or fraudulent practices as having occurred. In fact the words "fraud" or "fraudulent practices" were *nowhere to be found* in that letter.¹⁹

Finally, Mr. Diederich testified that after having worked for over a year with Petitioner, he had never seen him do a dishonest act, that he cross-complained against the Respondents for their misrepresenting him as accusing Pe-

¹³Petition, at 9.

¹⁴*Faith Center, Inc. v. Federal Communications Commission*, Nos. 81-1648 and 81-1649, D.C. Circuit, *supra*, Transcript of Paul Diederich, October 10, 1979, at 86-87, 96-97; 8 Jt. App. 2150-2151, 2160-2161.

¹⁵*Id.*, 8 Jt. App. 2160.

¹⁶*Id.*, at 9-11, 15, 53, and 56, 8 Jt. App. 2074-2076, 2080, 2118, and 2121.

¹⁷*Id.*, at 29, 8 Jt. App. 2094.

¹⁸Petition, at 10.

¹⁹*Id.*, at 9.

titioner or his church of fraud, and filed an amicus brief before this Court in support of Faith Center's attempt to obtain its license back after its fraudulent dismissal.²⁰

Similarly, Baumgartner's testimony revealed that, at the time of his firing, monies received from fund-raising had not been misspent²¹ that after he left he had no way of knowing what funds were expended,²² and that he himself had been assigned to work on the fountain of faith and the roof repair as a general contractor, and had seen the fountain constructed.²³

The second allegation, that monies raised were misappropriated by Petitioner, and funneled to other organizations in which he had an interest, was also conclusively disproven. Petitioner, having taken a pauper's vow, had no financial or ownership interest in *any* organization whatsoever. Again, the "Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc." and their "Broadcast Bureau's Response to Motion to Compel Answers"²⁴ made clear that the only organization in which Petitioner was alleged to have had any financial or ownership interest was Wescott Christian Center.²⁵ Yet, Wescott Christian Center is and always has been a non-profit church corporation, as the Bureau knew well.²⁶

²⁰*Id.*, at 10.

²¹*Faith Center, Inc., supra*, Transcript of Joseph Baumgartner, October 10, 1979, at 16, 9 Jt. App. 2187.

²²*Id.*, at 8, 12-16, 9 Jt. App. 2179, 2183-2187.

²³*Id.*, at 35-38, 9 Jt. App. 2206-2209.

²⁴See fn. 9, *supra*.

²⁵"Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc.", at 4, 1 Jt. App. 93; "Broadcast Bureau's Response to Motion to Compel", at 6.

²⁶"Response of Faith Center, Inc. to Interrogatories", February 1, 1979, at 7, 1 Jt. App. 117.

As a non-profit church corporation, Wescott Christian Center is governed by California Corporations Code §9200, that specifically precludes Petitioner, or any person, from asserting a personal interest in such a corporation.²⁷ Finally, Faith Center made clear that the only reason funds raised by Faith Center were deposited in a separate Wescott checking account, and then drawn from that account to pay Faith Center's bills, was to protect Faith Center during a continuing legal battle with the county tax authority which sought to tax constitutionally tax-exempt properties, a battle subsequently won and which elicited a letter of apology to Faith Center from the taxing authority.²⁸

The irony is that Baumgartner, identified by the above-referenced "Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc." and "Broadcast Bureau's Response to Motion to Compel Answers" as the sole individual alleged to have made this charge,²⁹ later under oath expressly admitted that Wescott was a non-profit corporation, and that therefore Petitioner did not own it,³⁰ and

²⁷§9200. *Lawful purpose without distribution of gains, profits, or dividends; incidental business for project.* A non-profit corporation may be formed by three or more persons for any lawful purposes which do not contemplate the distribution of gains, profits, or dividends to the members thereof and for which individuals lawfully may associate themselves, such as religious, charitable, social, educational, or cemetery purposes, or for rendering services, subject to laws and regulations applicable to particular classes of non-profit corporations or lines of activity. Carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations, but no corporation formed or existing under this part shall distribute any gains, profits, or dividends to any of its members as such except upon dissolution or winding up.

²⁸"Further Response to Interrogatories", August 17, 1979, at 2, 2 Jt. App. 351.

²⁹"Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc.", at 4, 1 Jt. App. 93; "Broadcast Bureau's Response to Motion to Compel", at 6.

³⁰Transcript, at 42, 9 Jt. App. 2213.

admitted that any transfers from Faith Center to Wescott were done at the direction of the board of directors of Wescott, not the Petitioner, during board meetings attended by Baumgartner.

Finally, regarding the allegation that Petitioner had made false over-the-air statements, namely, that he only received \$1.00 per year and that he had paid his pledges, the two above-referenced pleadings made clear that again Baumgartner was the only source for these allegations.³¹ However, in his deposition, he denied that he had accused Petitioner of falsely stating that he had received only \$1.00 per year from Faith Center, stating that he told the FCC that Petitioner received \$1.00 per year *plus expenses*.³² Further, he specifically stated, that *he did not know whether Petitioner had paid his pledges or not*.³³ Moreover, Faith Center provided sworn declarations from church personnel who actually witnessed Petitioner's pledges and actual contributions declaring that Petitioner not only paid in full his pledges, but *overpaid* them,³⁴ and the facts concerning Petitioner's salary were repeatedly and variously documented.³⁵ Far more importantly, however, though Petitioner never made the statements attributed to him by the FCC, the statements that he did make were never intended to motivate and in fact did not motivate giving, as only proper responses to Petitioner's "Theology of Giving" were sought.

³¹*Id.*, at 43-45, 9 Jt. App. 2214-2216.

³²"Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc.", at 5, 1 Jt. App. 94, "Broadcast Bureau's Response to Motion to Compel" at 7-8.

³³Transcript, at 55, 9 Jt. App. 2226.

³⁴*Id.* at 58, 9 Jt. App. 2229.

³⁵"Response of Faith Center, Inc. to Interrogatories", February 1, 1979, at 6-7, 1 Jt. App. 116-117; "Further Response of Faith Center, Inc. to Interrogatories", July 18, 1979, 2 Jt. App. 327K.

Thus, even if the above three allegations were made, they were all conclusively disproven, eliminating, as Petitioner has indicated, the factual predicate for the compelling governmental interest of the FCC. Even if Faith Center voluntarily assumed the burdens of governmental regulations affecting constitutional analysis upon its becoming a licensee, the donors did not assume these burdens, and the absence of a compelling governmental interest results in a violation of their religious freedoms.

As if to underscore the caprice of the FCC apparatus, both in connection with its renewal hearing process in general, and Faith Center's licenses in particular, the following should be noted. Faith Center owns four broadcasting licenses, KHOF-TV, Channel 30, San Bernardino, California, KHOF-FM, 99.5 FM, Los Angeles, California, KVOF-TV, Channel 38, San Francisco, California, and WHCT-TV, Channel 18, Hartford, Connecticut. The first three, worth between \$5,000,000 and \$10,000,000 *each*, have been dismissed, due to Faith Center's constitutional stance on the donor issue. After each station was dismissed, the FCC simply designated the next license for hearing, demanded the same church information concerning donor records, etc., and dismissed the licensees when, for reasons stated in the petition, it was not forthcoming. The arbitrariness of the FCC's action is revealed in the fact that while they dismissed Faith Center's license without allowing Faith Center to take advantage of distress sale relief and recoup its losses, it did allow distress sale relief as to WHCT-TV. It cannot be believed that the FCC would allow a sale of WHCT-TV for approximately \$3,000,000, the proceeds of which are to go to Faith Center, if it truly believed the licensee were engaged in fraud.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: November 7, 1983.

Respectfully submitted,

EDWARD L. MASRY,

*Counsel of Record for the
Honorable Mervyn M. Dymally.*

KATHRYN OSHIMA,

HAROLD STEWART,

*Counsel of Record for
Mr. Paul Diederich.*

EXHIBIT A.
Letter of Gary E. Crane.

[Letterhead]
Gary E. Crane
Certified Public Accountant

December 18, 1977

William B. Ray
Chief, Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
1919 M Street NW
Washington, D. C. 20554

Re: *Faith Center Church Fund Raising Report*

Dear Mr. Ray:

I have been asked by my client, Faith Center Church, to provide your office with information from the church's cash receipts and cash disbursements journals, as well as a general discussion on the recording, receipting and disbursing of donation income at Faith Center Church. Specifically, I have been asked to address four fund raising projects occurring at the church in 1976: the Fountain of Faith (mortgage), the studios roof repair, the microphones and sound equipment, and studios lighting equipment. By my signature attached hereto, I represent these facts and figures referenced herein to be true to the best of my knowledge and belief, under penalty of perjury.

Donation receipts at Faith Center Church are handled in the following manner. In order to understand the accounting principles utilized by the church in recording their operations of receipt and disbursement, one must follow the donations from the original pledges to the bank deposits:

1. The pledge is telephoned in to the television studios (see example attached), and telephone coun-

sellors indicate amount, address, and in some cases, the particular project or fund drive objective.

2. The pledge slips are forwarded to the mailroom at Faith Center Church the next day. The white original is mailed to the donor, with return envelope. The remaining pink and yellow slips are retained.
3. The donor responds to the pledge slip with cash, check, money order or other gift being mailed or otherwise delivered to the church.
4. The mailroom personnel receipt the gift for tax purposes to the donor, under Faith Center Church's I. R. C. Section 501(c)(3) exemption.
5. The mailroom personnel mark the retained pledge slip copies paid (donor retains original), and file slips in "paid pledges" file. Extra pledge copy is utilized if donor does not respond to first copy, or utilized for cross-filing systems.
6. The mailroom personnel reconcile, court and balance the daily cash gifts (including checks), and forward receipts to the cash receipts clerk.
7. The cash receipts clerk receipts the mailroom and records the cash receipts in the journal.
8. The cash receipts clerk prepares the bank deposit, including mailroom receipts, church sanctuary offerings, airtime sales receivables, etc., and makes deposit in bank account.

Designations on the pledge slips for specific projects are infrequent, inasmuch as most of the pledges are made in response to general requests for operations funds. Some of the checks or letter accompanying checks or cash indicate projects, suggest ideas, and indicate a response to a particular campaign. The mailroom keeps informal records as to the location of the donor (as between the three geographical broadcast areas served by Faith Center Church's stations) and reports totals in the three areas to Pastor Gene Scott for

discussion on the "Festival of Faith."

The gifts are received, deposited and receipted regardless of "project" or other designation, as gifts to the general ministry of Faith Center Church. Certain categorizations are maintained by the cash receipts clerk regarding project designations gleaned from check detail, pledge slips etc., and these categorizations are entered in the cash receipts journals. These categories are for informational purposes only, however, and do not dictate the source of deposit or the disbursement of these particular gifts.

To my knowledge the church has never raised any funds for a project that was not openly discussed beforehand, and was subsequently completed whether sufficient funds were received in the pledge drive, or not. The actual disbursement of project funds may occur simultaneously, as the pledges are paid, or long before or after the funds are received or spent.

One additional factor to keep in mind, and a factor that is noted by footnote in my recent audit of the church, is the much-discussed twenty-five percent taken from all church income and paid towards reduction of past due debt incurred prior to Pastor Gene Scott's October 31, 1977 arrival at Faith Center Church.

I have inspected the cash receipts journals, as well as the cash disbursements journals, in regards the four projects of current concern to the Federal Communications Commission. Because the church does not consider the gifts trusts, and does not maintain separate funds for projects, it is difficult to trace the receipts for projects to disbursements for same. I can, however, report the following:

FOUNTAIN OF FAITH:

It is my understanding that these fountain receipts were solicited for purposes of paying off a balloon final payment on a church sanctuary mortgage written in 1964 with the

St. Louis Union Trust Company. The cash receipts journals running from the time of the original solicitations indicates aggregate receipts of \$153,750.00, received largely in pledge/gifts of one thousand dollars per donor. The receipts records and designations were carefully maintained because in this one instance, each of the donors was to be memorialized by bronze plaques on the Fountain of Faith. The breakdown of the disbursement of these funds is computed as follows:

TOTAL funds collected	\$ 153,750
LESS 25% for debt retirement	\$ (38,438)
MORTGAGE payoff, verified by inspection of release papers and savings account debits payable to local bank for cashier's check payable to trust company on or about April 8, 1977	\$ 92,059
FOUNTAIN funds available.....	\$ 23,073

The Commission should keep in mind, however, that the fountain will be built regardless of the expense, depending on the current cash available from the general fund. If surplus funds result from the construction, the general fund will benefit from the surplus. If the funds listed above are insufficient, the general funds will be called upon to meet the difference. Estimates running from \$10,000.00 to \$50,000.00 have been reported by the man in charge of the construction, Paul Durbin. Reasons for delay in the construction are outlined in the statement by Mr. Durbin filed on even date herewith with the Commission.

STUDIO MICROPHONES

I have inspected the cash receipts journals and find therein a categorization described as "microphones" going back to amounts first reported in October of 1976. The total receipts reported in the journals comes to \$6,823, reduced to \$5,117

by the twenty-five percent debt reduction factor. A review of the cash disbursements journals for the same period reveals expenditures in an aggregate of \$5,196 for sound equipment. Inspection of invoice indicates \$2203 expended for microphones and stands, \$509 for studio monitor speakers, and \$2483 in sound equipment rentals. The only designation in cash receipts journal fpr this category is "microphones", but it is my understanding that Pastor Scott's discussion on television began with microphones, as a specific need at the studio created by two concurrent production schedules, but indicated other pieces of as yet unspecified sound equipment were needed as well. It is my understanding, on the basis of reports to me by Chief Engineer Bernard Marston, that all of the above sound equipment purchases involved equipment needed because of the "two studio" concurrent production problem which was inspiration for the fund drive.

STUDIO LIGHTS:

After inspecting the cash receipts categorizations made by the cash receipts clerk for the past fourteen months, I am unable to report any project called "studio lights". I can therefore not report receipts for same, and if any such category indeed existed, there in no way other than by contacting all donors over the past year that I can confirm receipts in this category, if any.

I have also inspected the cash disbursements journals, and have found there disbursement records for light fixtures and bulbs over the past fourteen months totaling \$3,296, paid out to two lighting companies, Mole-Richardson for fixtures, and Preferred Distributing Company for bulbs.

ROOF REPAIR:

After inspecting the cash receipts categorization made by the cash receipts clerk for the past fourteen months, I have

totaled \$6,739 in funds categorized as "roof repair." Inasmuch as performance of this repair would involve expenditures falling into several cash disbursement categories, I am unable to report any specific expenditures. I can report that Mr. Paul Durbin has been on the church payroll as carpenter and maintenance and builder since January of 1977, and I am informed that he has spent most of his time on either the roof or the Fountain of Faith. I am also informed that roof repair is an ongoing operation, and roof replacement is anticipated and desired when the necessary funds are available. I think that despite the vagueness of the expenditures, it would be safe to observe that a "paper surplus" exists in the roof repair category.

It is important to note that submission of the cash receipts and cash disbursements journals to the Commission, would open up the entire confidential records to the Commission for a very narrow purpose. The records include church school records, summer camp records, Sunday sanctuary offerings, mission projects, personnel and other irrelevant and sensitive church affairs. I have been instructed by my client, Faith Center Church, to make specific details available upon placement of the Commission of specific charges. I would urge the Commission to cooperate in this exchange of particular information in order that both the church and the Commission avoid the unnecessary church and state confrontation problem.

The above observations and statements are offered under penalty of perjury. This statement was signed by me in Glendale of December 16, 1977.

/s/ Gary E. Crane
Gary E. Crane
Certified Public Accountant

GEC/bhs

EXHIBIT B.

**Statement of W. Bernard Marston,
Director of Engineering,
Faith Center Stations.**

[letterhead]

**FAITH BROADCASTING NETWORK
Executive Offices**

December 16, 1977

Mr. William B. Ray
Chief, Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Ray:

The following is my recollection of the circumstances regarding the raising of funds by Dr. Gene Scott and the subsequent purchase of sound equipment and lights for use in Faith Center's television and radio ministries.

1. SOUND EQUIPMENT

During a telethon held in September 1976 it was necessary to originate some back-to-back and simultaneous programming from two different locations, Faith Center Church and Faith Center's television production studios, separated by about 1½ miles. In the past there had always been sufficient time between scheduled use of the two facilities to permit transport, even though inconvenient, of the necessary equipment from one place to the other. However, after suffering the confusion and disability caused by these particular circumstances, it was suggested that Dr. Scott raise the money on the air to purchase duplicate sound equipment in order to prevent a future recurrence of these problems.

The engineering staff provided Dr. Scott with estimates of the cost of the sound equipment needed to be duplicated, and after adding the customary 25% reserved from all Faith Center receipts for debt retirement, received pledges amounting to around \$6,000. According to available records \$6,823 was received from donors designated for sound equipment. This figure includes the 25% allowance for debt retirement.

I have personal knowledge that purchase requisitions were issued for microphones and microphone stands totalling \$1,367.93, an additional wireless microphone for \$835.65, studio monitor speakers for \$509.97, and rental of additional sound equipment necessitated by lack of duplicate equipment totalling \$2,483.00 for an overall total of \$5,196.55, and that this equipment was received and used for the purpose designated. (See exhibits with this letter).

Subsequent to raising funds for purchase of sound equipment, a sister church transferred equipment valued at between \$9,000 and \$10,000 to Faith Center. Items of this equipment were placed in use in one of the Faith Center television studios making it possible to leave previous equipment permanently installed in the other studio and avoiding the necessity of purchasing additional equipment such as studio monitor speakers whose replacement cost exceeds \$2,000.

2. *LIGHTING EQUIPMENT*

The same set of circumstances detailed above created a need for additional lighting instruments at the Faith Center television production studios. The necessary extra lights for the telethon set were rented from Mole-Richardson Company of Hollywood, California. An outgrowth of this telethon was the **FESTIVAL OF FAITH**, a daily live program hosted by Dr. Gene Scott utilizing the former telethon set.

It was therefore necessary to keep the additional lights and the decision was made to buy them rather than continue to pay rent.

The records show that \$3,296 was paid out for purchase of lighting equipment. It is certain that Dr. Scott mentioned at some time on the FESTIVAL OF FAITH program the need for additional lights, as he similarly often mentions the need for other equipment, but there was no concerted fund raising effort in that direction or definite monetary goal established. According to the records available to me, no donations were ever received that were designated for purchase of lights. There is also an on-going expense of approximately \$500.00 per month for replacement of quartz-halogen globes to keep the studio lights operative.

/s/ W. Bernard Marston
W. Bernard Marston
Director of Engineering
Faith Center Stations

State of California, County of Los Angeles — ss

On December 16, 1977 before me, the undersigned, a Notary Public in and for said State, personally appeared Bernard Marston, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Signature Margaret A. Kielinski

[Seal]

EXHIBIT C.

**Statement of Paul Allen Durbin,
Faith Center Church Builder and Carpenter.**

[Letterhead]

Faith Center

December 16, 1977

Mr. William B. Ray
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Ray:

I've been asked to explain in my own words what I know about the fund raising for the roof for our studios, and for the Fountain of Faith. Since I've been actively involved in both projects as a member of Faith Center Church, as a listener to the Festival of Faith, and as the General Builder at Faith Center Church, I should be able to offer some insights as to just what happened. I have worked for Dr. Gene Scott both as a volunteer and as an employee, since sometime in late 1976. The first two things Dr. Scott gave me to do was to fix the studios roof and continue preparation on the Fountain of Faith. The roof and the fountain had been the responsibility of Joe Baumgartner before he left, but he had not finished either project. In fact nothing much at all was done on either project until I took over. And possibly you might say not enough has been done since I took over, but I leave that up-to you.

THE ROOF:

The first thing I remember happening about the roof occurred one night on the Festival (Festival of Faith) when Dr. Scott was ministering as usual in the church's Glendale television studios on Broadway Street. Dr. Scott was suddenly interrupted by rain water seeping through the ceiling

and dripping on the red communion table behind him. Dr. Scott, true to his "tell it like it is" style, asked the cameraman to focus on the puddles, and soon the ceiling tiles were following on studios guests. The weight of the water-soaked rock wool insulation was just too much for the ceiling tiles to hold!! They were dropping here and there and spreading rock wool fibers on people and the floor. I remember one hitting our cameraman, Larry, on the head, with Dr. Scott laughing and turning the other camera on Larry. I also remember being put on camera while I was fixing the roof and making temporary repairs during various Festivals. I had to run around the studios placing drip buckets and placing plywood shields to protect the Festival singers and Dr. Scott and the audience.

One night somebody called in and suggested that some money be raised for the roof. There was an immediate response. Anytime something puts Dr. Scott in jeopardy, there is always an immediate response. This is the way I feel too, and I share that feeling with thousands of viewers.

Anyway, I remember shortly after the person called (and it was obvious that the viewers were concerned by the avalanche of notes and comments that came in over the studio telephones) Dr. Scott said he would honor their response (he's said many times that he didn't want to start building projects until the debt was paid). He called upstairs and asked Joe Baumgartner, who was still working here then, how much it would cost to fix the roof. Joe replied with some figure that I don't recall, but I believe it was about \$2,000.00. I do not recall if the figure was for just repair or to replace the whole roof, but considering the cost of replacement of such a big roof, it must have been just for repair of the old one. I don't know how many pledges came in that night but I'm sure there were more than he asked for the roof.

When I went to work on the roof repair project I discovered that three large connected buildings were involved at the studios. Each roof was a separate "built up" type, over an arched "barrel" balancing on trusses. One of the three roof sections had a construction flaw where two trusses came together, right over the main television set in studio A, where the Festival of Faith is performed. There was a large split in the roofing papers and leaks around the air ducts. With the help of another Faith Center worker (Jim Castillo) I tried to patch the area to keep the rain out. We used thick mastic, which proved inadequate when tested in the next rain. The roof still leaked, although not as bad. We went back up and tried six-inch wide fiberglass strips under more special thick roof repair mastic. this repair seemed to worked for the time being.

Within six months, however, it was evident that this latter patching system wouldn't work either. The heavy traffic out in front of the studios on Broadway was causing vibrations that was working the two flawed trusses over studio A, and the vibrations worked the roof pieces apart again causing further leaks. We now intend to replace the fiberglass with sheet metal, and see if that does it.

We have a further problem over the shop area of the studios, where the roof is improperly lapped. Instead of the usual overlapping pattern that allows rain to run down over each roof piece, many of the roof sheets are lapped exactly the wrong way, so that water runs into each of the grooves and into the shop. Although mastic helps, this roof needs to be ripped up and replaced.

I also did work on the inside ceiling where all the tiles kept falling down. I used some extra tiles found around the church and basically returned to the ceiling to a workable state. Of course, if the ceiling leaks again, which it may when the vibration separates the roof pieces, the tiles could

swell and fall again.

Well, anyway, we repaired the roof and ceiling. Jim Castillo and I are on staff, so the labor has to be included in your salary. If Dr. Scott had ordered the work done by regular journeyman carpenters or builders, it would have cost him about \$1000.00 to \$1200.00. And we aren't really done yet. I want to try the sheet metal repair, and we have obtained two or three bids for a complete roof replacement, which we must eventually do for a permanent repair. The church has lots of bills and its always difficult to get maintenance done.

THE FOUNTAIN:

As I stated earlier, I was given the assignment of the fountain right after Joe Baumgartner was dismissed. I didn't really know the man because he only worked a few more months while I was here and then was fired by Dr. Scott. I do know one thing, he was a terrible builder. He did most of the construction on the church sanctuary and the studios and everytime I go to repair something I find goofs and mistakes and just bad work. Baumgartner's construction work on Faith Center Church makes my maintenance job really a nightmare, especially when you consider the lack of money and all.

Anyway, Dr. Scott asked me to ask Joe for any and all plans, information, etc., on the Fountain of Faith project, so that I could get working on it. Even though Joe had been working on it for over six months, he had nothing in his files, except a book on fountain lights and pumps.

So I had to start from scratch. I had to work up from the artist's conception that had been drawn for use during the fund raising drive at the church. I scanned the yellow pages for fountain construction firms and found out, the hard way, that this type of project is basically an "artistic project."

Construction people are not hard to come by, but "artistic talent" that is willing to build what another artist has already conceived, is another thing. Even the architect would have to work from pre-conceived notions of what the fountain would look like. When I finally found a willing architect, it was hard to keep him from altering the original design to suit his particular style.

I got some good advice from a Mr. Phil Giggiacono, a builder-srtist that has done work at Disneyland and for the Los Angeles Museum of Art. Phil indicated that an exact replica of the fountain depicted by the first artist could cost as much as \$100,000.00. I've got many other estimates from \$10,000.00 to \$50,000.00, depending on the approach or the detail of the fountain.

After much discussion and reserach, I managed to get a copy of some working plans. Mr. Esser, our attorney gave the Commission investigators copies of these first plans when they were here in September. I also obtained a city building permit from the city of Glendale.

There are hundreds of questions on the detail, many of which involve money decisions. We've talked about the kind of tile on the base, a large bowl to hold the water. This bowl was changed to a pool on later plans to save money and balance the design. The pump mechanism had to be designed, and a separate pump house as well. The one hundred and twenty spigots for the water had to be spaced and regulated, and a type of labeling developed to list all the names of the donors. The structure of the globe and the continents and mountains was very difficult. We had to have someone sculpt the relief, and arrange for the broadcasting tower to support the globe. By the time these endless little details were discussed, I had a third set of different blueprints.

The final big hassle was the City Building Department. They had no problem with the construction permit, as mentioned earlier, but Glendale has a very strict sign ordinance law and they raised major questions with the size of the sign on top and the entire structure. They turned the plans down as an unacceptable sign! We talked with them and they discuss various alterations which would completely change the concept of the fountain. The proportions were so carefully worked out that they couldn't change the tower or the sign or the globe without changing all the parts, including the pool. We were exasperated, and appeared defeated.

Finally, however, we contacted a lady of influence in town that was interested in beautification projects involving works of art. She helped us arrange re-classification from a sign to a work of art, and the city signed the permit for the plans. We still had some negotiation with the Forest Lawn Memorial Park across the street, because of this "art fountain" status, because this Park (a private burial park with many fountains and works of art within view) has a "restrictive easement" on the church property giving them the right to pre-approve the building of decorative fountains. So far, it looks like they will go along with the current plans, although they have shown some reservation about the size of the project.

We have expended many hundreds of hours of my time, plus several thousand dollars in architect's fees. While we have secured a promise from a plumber in the congregation to do the plumbing free on the fountain, it is still difficult to estimate the amount of money needed for completion. We should be ready to start construction the first of the year if no more legal hassles all permits get in our way. The Fountain will serve as a symbol of this church's ability to pay off its mortgage in the first major fund raising drive after Dr. Scott arrived at the church. The people's names

on the fountain will include most of my friends here at Faith Center Church, and included there will be the names of my wife and I, Alice and Paul Allen Durbin. We responded to Dr. Scott's requests and prayers, and we think the Fountain would be a perfect symbol of the new Faith Center Church.

The above is as I remember it, and as it is, and is offered under penalty of perjury. I signed this statement in Glendale on December 20, 1977.

Sincerely,
/s/ Paul A. Durbin
Paul Allen Durbin

PAD/bhs

EXHIBIT D.

**Summary of Money Raised
on Sixteen Projects.**

The information provided herein makes reference to money raised for each particular project.

The information below is as follows:

- a. Amount raised for project.
- b. Portion of amount raised which was expended for project.
- c. Dates and amounts of expenditures for project.

1. KOREA

- a. \$5,389.00.
- b. All of it.
- c. 12/2/76 — \$2830.00
6/17/77 — \$5013.00.

2. MICROWAVE

- a. \$48,674.00.
- b. All of it.
- c. 1/11/77 — \$2800.00
6/27/77 — \$4333.00
6/27/77 — \$4333.00
7/28/77 — \$2500.00
7/28/77 — \$2500.00
9/22/77 — \$2500.00
9/22/77 — \$2500.00
8/3/78 — \$164,256.00
11/1/78 to present — \$2925.00 per month
11/1/78 to present — \$100.00 per month
3/27/79 — \$34,651.00 (Farinon contract for equipment).

3. *JOE DUNETS* (Missionary to Brazil)

- a. \$795.00.
- b. All of it.
- c. 8/16/77 — \$1500.00.

4. *PIANO*

- a. \$5,623.00.
- b. All of it.
- c. 10/15/76 — \$225.00
10/29/76 — \$200.00
11/16/76 — \$375.00
12/13/76 — \$450.00
12/29/76 — \$300.00
2/9/77 — \$900.00
6/15/77 — \$2,385.00
7/5/77 — \$2,385.00.

5. *VTR HEAD*

- a. \$742.00.
- b. All of it.
- c. 2/24/77 — \$1007.00.

6. *TELEPHONES*

- a. \$21,705.00
- b. All of it.
- c. 12/6/76 — \$3415.00
12/22/76 — \$2164.00
1/31/77 — \$1839.00
3/8/77 — \$1868.00
4/1/77 — \$1907.00
4/27/77 — \$1859.00
6/1/77 — \$1971.00
6/27/77 — \$2138.00
7/23/77 — \$1942.00
8/19/77 — \$1928.00
9/22/77 — \$1979.00.

7. *KLYSTRON TUBE*

- a. \$10,000.00.
- b. All of it.
- c. 8/17/77 — \$15,710.00.

8. *JAKE HESS*

- a. \$1600.00
- b. All of it.
- c. 4/77 — \$3000.00
5/77 — \$3000.00
6/77 — \$3000.00
7/77 — \$3000.00
8/77 — \$3000.00.

9. *PAUL FINKENBINDER MINISTRIES*

- a. \$4231.00.
- b. All of it.
- c. 2/13/77 — \$4000.00
3/3/77 — \$2000.00.

10. *SAN FRANCISCO TRAVEL*

- a. \$3,557.00.
- b. All of it.
- c. 8/31/77 — \$300.00
9/19/77 — \$1500.00
9/22/77 — \$76.00
9/25/77 — \$2556.00
9/23/77 — \$\$243.00
10/28/77 — \$75.00
11/29/77 — \$1500.00
10/15/79 — \$2307.00
12/2/79 — \$3500.00
12/2/79 — \$2512.00
12/2/79 — \$2547.00.

11. *KOREA TRAVEL (DR. SCOTT)*

- a. \$38.00.
- b. None of it.
- c. It is held as restricted funds.

12. *MOE COMPANY (MARVIN MOE, MINISTER)*

- a. \$1039.00.
- b. \$1000.00.
- c. 1/25/77 — \$1000.00.

13. *PTL*

- a. \$18,607.00.
- b. All of it.
- c. Daily from November 2, 1976 through the relevant period at the air time rate of \$30,000.00 per month.

14. *ROOF*

- a. \$5054.00.
- b. \$2200.00 (salary allocation).
- c. 1/77 — \$2200.00
(\$2854.00 held as restricted funds).

15. *MICROPHONES*

- a. \$5117.00.
- b. All of it.
- c. 12/30/76 — \$475.00
1/5/77 — \$1010.00
1/13/77 — \$510.00
2/14/77 — \$1007.00
7/14/77 — \$886.00
8/14/77 — \$908.00
8/17/77 — \$361.00
12/5/77 — \$900.00.

16. *FOUNTAIN OF FAITH (NOT A PROJECT)*

- a. No money was raised for the Fountain of Faith. Expenditures for GLOBE and TOWER: (As per picture)

12/7/78 — \$500.00
12/7/78 — \$500.00
1/79 — \$500.00

2/9/79 — \$200.00

2/15/79 — \$200.00

2/23/79 — \$200.00

5/3/79 — \$200.00

5/21/79 — \$200.00.

BALANCE DUE — \$544.00

**Expenditures for ELECTRIC WORK ON
FOUNTAIN:**

12/78 — \$1000.00

12/78 — \$500.00

1/79 — \$500.00

2/79 — \$200.00

2/15/79 — \$200.00

2/23/79 — \$200.00

2/28/79 — \$1211.00.

Expenditures for FOUNTAIN SPRAY NOZZLES:

1/79 — \$500.00

2/9/79 — \$200.00

2/15/79 — \$200.00

2/23/79 — \$200.00

5/3/79 — \$221.00.

Expenditures for TILES:

8/78 — \$551.00

3/6/79 — \$1275.00.

Expenditures for ARCHITECTS' FEES:

6/21/77 — \$650.00

3/3/77 — \$300.00

9/30/77 — \$478.00.

(Additional amounts unknown.)

(A local plumbing company, members of the church, donated most of the labor and materials to build the Fountain of Faith.)